NO. 92-276

Supreme Court, U.S.
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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARIE M. KRIETER, TRUSTEE
Petitioner,

v.

LAWTON CHILES, Governor of the State of Florida; JIM SMITH, Secretary of State; BOB BUTTERWORTH, Attorney General; GERALD LEWIS, Comptroller; TOM GALLAGHER, Treasurer; BOB CRAWFORD, Commissioner of Agriculture; and BETTY CASTOR, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

If the State of Florida dedicates submerged lands offshore the Krieter family's riparian holdings for a state park, can the state thereafter deny the Krieters the right to construct a wharf extending into the Atlantic Ocean, where no environmental harm will result from such construction, without the payment of just compensation for the taking of riparian rights?

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding before this Court are:

Petitioner: Marie M. Krieter, Trustee and her successors as Trustee of the Marie M. Krieter Trust, dated November 15, 1989.

Respondent: Lawton Chiles, Governor of the State of Florida; Jim Smith, Secretary of State; Bob Butterworth, Attorney General; Gerald Lewis, Comptroller; Tom Gallagher, Treasurer; Bob Crawford, Commissioner of Agriculture; and Betty Castor, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida.

Both of the above-named parties were parties to the proceedings below.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MARIE M. KRIETER, TRUSTEE
Petitioner,

v.

LAWTON CHILES, Governor of the State of Florida; JIM SMITH, Secretary of State; BOB BUTTERWORTH, Attorney General; GERALD LEWIS, Comptroller; TOM GALLAGHER, Treasurer; BOB CRAWFORD, Commissioner of Agriculture; and BETTY CASTOR, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

The Petitioner, Marie M. Krieter, Trustee, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the Third District Court of Appeal of Florida entered on February 11, 1992.

OPINIONS BELOW

The order of the Supreme Court of Florida denying the Petition for Review is not reported, but is reprinted as Appendix A. The opinion of the Third District Court of

Appeal of Florida is reported at 595 So.2d 111 (Fla. 3rd DCA 1992), and is reprinted in the Appendix as Appendix C. The order of the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida is not reported, but is reprinted as Appendix D.

JURISDICTION

This Petition seeks review of an opinion and judgment of the Third District Court of Appeal of Florida for which the Supreme Court of Florida denied a Petition for Review. This Petition is filed within ninety days of the order of the Supreme Court of Florida, pursuant to 28 U.S.C. Section 2101(c), and U.S. Supreme Court Rule 13.4.

The jurisdiction of this Court to review the judgment of the Third District Court of Appeal of Florida is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ...nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

Petitioner Marie M. Krieter, Trustee, on behalf of the Krieter family, filed suit in Monroe County Circuit Court in February 1991. The complaint was brought under the provisions of Section 253.763, Florida Statutes (1991), and a second count brought under the Constitutions of Florida and of the United States, for a taking of private property without compensation. Respondent Board of Trustees moved to dismiss for failure to state a cause of action or in the alternative to strike, and an Order of Dismissal was entered by the Circuit Judge.

On February 11, 1992, the Third District Court of Appeal entered its Opinion affirming the dismissal by the Court below, and on April 14, 1992, the Court denied Petitioner's Motions for Rehearing, Certification, and for Rehearing En Banc.

On April 20, 1992, Petitioner filed a Notice to Invoke Discretionary Jurisdiction in the Supreme Court of Florida. Both Petitioner and Respondent filed briefs concerning jurisdiction, and on June 24, 1992, the Court entered an order denying the Petition for Review.

Marie M. Krieter, Trustee, is the owner and record title holder of Lot 32, Block 1, Amended and Extended Plat of Key Largo Ocean Shores, Plat Book 4, page 18, of the Public Records of Monroe County. Respondent Trustees are the Governor and Cabinet of the State of Florida, sitting as the Board of Trustees of the Internal Improvement Trust Fund, the State agency holding title to the State submerged sovereignty lands, and charged with management of those lands pursuant to Chapter 253, Florida Statutes (1991).

On December 3, 1959, Respondent Trustees dedicated a parcel of submerged lands some three miles offshore Key Largo to the Florida Board of Parks and Historic Memorials for the establishment of the John Pennekamp Coral Reef State Park. On September 21, 1967, the Trustees dedicated the submerged lands between the John Pennekamp Coral Reef State Park and Key Largo for public state park purposes, subject however to any riparian rights and interests which may exist in or affect those lands

Petitioner and her family have been involved in the development and sale of lots and homes in Key Largo Ocean Shores for over twenty years. The property fronts the Atlantic Ocean, with approximately 100 feet of shoreline. Robert C. Krieter resides in a home on the lot and on May 10, 1988, submitted an application to construct a private wharf to the Florida Department of Environmental Regulation. The department determined the proposed work to be exempt from permitting.

Under the provisions of Rule 17-312.060, Florida Administrative Code, the Department of Environmental Regulation sent a copy of the application to Respondent Trustees. The Trustees sent a letter dated September 22, 1988, to Robert Krieter's engineer stating that a letter of consent would be required authorizing construction of the dock. On October 8, 1990, Robert C. Krieter modified the proposed dock application to conform to the Trustees' Florida Keys Marina and Dock Siting Policies at Rule 18-21.0041, Florida Administrative Code. On December 18, 1990, the Trustees denied Robert Krieter's request for consent of use and stated that on April 12, 1990, the Governor and Cabinet adopted a policy that no future authorizations would be issued for the construction of new private docks in John Pennekamp Coral Reef State Park waters.

The trial court's order of dismissal states simply,

> Ordered and Adjudged that Plaintiff does not possess the unqualified right to build a wharf or dock and Defendant's Motion to Dismiss is granted and the Complaint herein is accordingly dismissed.

The constitutional questions were brought in the first instance to the Circuit Court for the Sixteenth Judicial Circuit in and for the State of Florida by way of paragraph 28 of the Complaint, which states:

> 28. The denial of Plaintiff's requested consent of use constitutes a taking of private property without compenation in constravention of Article I, Section 9, and Article IX, Section 6, of the Florida Constitution and Amendments V and XIV of the United States Constitution.

This Court's decision concerning riparian rights was brought to the attention of the Circuit Judge, through Petitioner's Memorandum of Law, with direct citation to the case of *Yates v. Milwaukee*, 77 S.Ct. 497 (1870). The issue of an unconstitutional taking of property was briefed and argued before the Third District Court of Appeal, including the case of *Yates v. Milwaukee*, supra.

REASONS THE WRIT SHOULD BE GRANTED

1. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *YATES V. MILWAUKEE*, 77 S.CT. 497 (1870).

In Yates, the riparian owner constructed a wharf some 190 feet out into the Milwaukee River. Subsequently the Common Council of Milwaukee by ordinance declared

Yates' wharf to be an obstruction to navigation and ordered it to be abated. There was no evidence to show that the wharf was an actual obstruction to navigation, or was in any other sense a nuisance. The Common Council contracted with a third party to remove the wharf and Yates filed for an injunction to restrain the removal of his pier. His suit was dismissed and he appealed to this Court.

This Court stated unequivocally:

> But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be.

Id. at 504.

This Court continued:

> This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.

Id. at 504.

As a result of shallow waters immediately offshore Key Largo, the only navigable access available to the Krieter family is through the construction of a dock. Since the time of earliest settlement of Key Largo, docks have been constructed out into the Atlantic Ocean. Since the time of statehood, the Florida Supreme Court has acknowledged the riparian owner's right to wharf out.

The Trustees' prohibition against dock construction in April 1990 occurred well after the Kreiter family had obtained title to the subject property. As this Court recently stated:

> Where the state seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logical and antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.

Lucas v. South Carolina Coastal Council, ____ S.Ct. ____, 1992 WL 142517 (1992).

In an analogous confrontation regarding the boundary between state-owned water bottoms and uplands of riparian owners, the Florida Supreme Court held that such matters were controlled by ancient common law and by Federal law. *State of Florida v. Florida National Properties, Inc.*, 338 So.2d 13 (Fla. 1976).

II. THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT CONCERNING THIS PARTICULAR QUESTION.

A Connecticut case directly on point is *Town of*

Orange v. Resnick, 109 Atl. 864, 94 Conn. 573 (Conn. 1920), in which a riparian owner attempted to construct a bathing pavilion in front of his upland, stretching over and across the shore between the high and low water mark. However, the State of Connecticut had previously dedicated the land between the high and low water mark in front of the riparian owners' upland to the town of Orange for the purpose of a public park. The town brought suit against the riparian owner to restrain an encroachment on the land of the town. In comparing the right to build a bathing pavilion with the accepted riparian right to wharf out, the court found that the privilege to develop the shore in this way "...may constitute a large part of the value of the adjoining upland and that when this is done without obstruction of the navigation, it is a legitimate use of the owners advantages." *Id.* at 866.

Having thus decided that building the pavilion was a lawful exercise of riparian rights, the court then faced the second part of its analysis in determining if due compensation was required. The court answered this question in the affirmative and held:

> The riparian rights of the owner of adjoining upland clearly constitute interest in property. This being so, it must follow that the taking of the soil between the high and low water mark for the purposes of converting it into...a public park, is as against abutting riparian owners a taking of private property for public use.

Id. at 866, 867.

The Supreme Court of Michigan reached a similar result in *Hilt v. Webber*, 252 Mich.Rpt. 198 (Mich. 1930):

> Generally speaking riparian rights are:
> (1) Use of the water for general purposes, as bathing, domestic use, etc. (2) To wharf out to navigability (3) Access to navigable waters. 27 R.C.L. pp. 1070, 1375; 45 C.J. p. 491; Black's Pomeroy on Water Rights, p.517.

Id. at 225.

In a concurring opinion, Judge Potter states:

> Whether the title to the lands between the water's edge at high-water mark and low-water mark is in the riparian proprietor or in the State for the use and benefit of the public, including the riparian proprietor, is not important. If the title is in the State it holds it as a mere naked trustee subject to the right of access, to wharf and dock out, the right of bathing, the right to use, for domestic and agricultural purposes, the waters of the lake, and subject to all other rights of the riparian proprietor. The State has no power to divest itself of this trust. It may not sell and convey title to this land, interfere with the riparian proprietor's rights or the beneficial use thereof by such riparian proprietor, *constitute such lands a public park*, preventing the riparian proprietor from operating mines, pits, or quarries thereon, or exercise dominion and control over it to the exclusion of the riparian proprietor, or in interference with his rights, without condemnation of the rights of the riparian proprietor and the payment of just compensation therefore.
> (emphasis supplied.)

Id. at 228.

Rhode Island courts addressed the issue, and in *Nugent v. Vallone*, 161 A.2d 802, 91 RI 145 (RI. 1960), the Supreme Court held:

> Indeed it appears to have been long recognized in this state that this right to wharf out is a common law right, which in the absence of a statute to the contrary will not be denied, provided that the exercise thereof does not interfere with navigation or the rights of other riparian proprietors.

Id. at 805.

An extensive discourse is found contrasting riparian rights with the public trust doctrine under the laws of the State of California in the case of *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971), in which the court relates:

> A littoral owner has been held to have the right to build a pier out to the line of navigability.

Id. at 382.

The courts of the State of Florida have only recently equated the ownership of submerged lands with riparian rights, and for the first time have departed from a long progression of cases affirming the riparian owner's right to wharf out.

CONCLUSION

Wave after wave of environmental regulation have crested upon the interests of private property owners throughout the State of Florida and across the United States. The opinion by the Third District Court of Appeal of Florida is the first reported opinion holding that a

riparian property owner does not have the right to wharf out. There is no question but that the right is subject to regulation by the police power. However, that is not Marie Krieter's case. A park was created offshore her lands and solely as a result of the creation of that park, her riparian rights were taken for public purposes without compensation. Private property rights are becoming endangered species. The snail darter and the Key Largo wood rat have had their day in court and at this point Marie Krieter is simply asking that she and her family have their day, and be provided an opportunity to prove their claim. Marie Krieter asks this Court assume jurisdiction, reverse the decisions below and send the case back to Monroe County for trial.

Respectfully submitted,

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Post Office Drawer 6506
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904/926-6300

Attorney for Petitioner
Marie M. Krieter,
Trustee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Petition for Writ of Certiorari have been served this ____ day of _____, 1992 by U.S. Mail upon John Costigan, Esq., Department of Natural Resources, 3900 Commonwealth Blvd., Tallahassee, Florida 32399.

_____

Robert A. Routa

APPENDIX A

SUPREME COURT OF FLORIDA

Maria M. KRIETER, etc.,
Petitioner,

V.

Lawton CHILES, etc., et al.,
Respondent.

Nos. 79,746, 91-2145.

District Court of Appeals,
Third District.

June 24, 1992.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, Acting C.J., BARKETT, GRIMES, KOGAN and HARDING, JJ., concur.

cc. Hon. Louis J. Spallone, Clerk
Hon. Danny L. Kolhage, Clerk
Hon. J. Jefferson Overby, Judge

Robert A. Routa, Esquire
John W. Costigan, Esquire

APPENDIX B

Marie M. KRIETER, Trustee,

Appellant,

V.

Lawton CHILES, Governor of the State of Florida, et al.,

Appellees.

No. 91-2145.

District Court of Appeal
Third District.

April 14, 1992

Upon consideration, appellant's motions for rehearing, certification and for rehearing en banc are hereby denied. Florida Audubon Society's motion for reconsideration is denied.

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

cc: Robert A. Routa
John W. Costigan
Joseph Z. Fleming

APPENDIX C

Maria M. KRIETER, Trustee

Appellant,

v.

LAWTON CHILES, Governor of the State of Florida; JIM SMITH, Secretary of State; BOB BUTTERWORTH, Attorney General; GERALD LEWIS, Comptroller; TOM GALLAGHER, Treasurer; BOB CRAWFORD, Commissioner of Agriculture; and BETTY CASTOR, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,

Appellees.

N. 91-2145

District Court of Appeal
Third District.

January Term, 1992

Opinion filed February 11, 1992.

An Appeal from the Circuit Court of Monroe County, J. Jefferson Overby, Judge.

Robert A. Routa, for appellant.

John W. Costigan, for appellee.

Before BASKIN, JORGENSON, and LEVY, JJ.

LEVY, Judge.

This case involves a dispute over the construction of a private dock on submerged land held in title by the State of Florida in its sovereignty. The parties do not dispute that title to the submerged land in question is held by the state. This submerged tidal land is held in trust, by the Trustees, for the people of the state.[1] *Hayes v. Bowman*, 91 So.2d 795 (Fla. 1957). When Florida became a state in 1845, it took title to those submerged lands to hold in trust for the use and benefit of all the people of Florida. *See, e.g., Broward v. Mabry*, 58 Fla. 398, 50 So.826 (1909). In more recent times, the common law Public Trust Doctrine was codified in Article X, Section 11 of the Florida Constitution. This provision states that:

> [t]he title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest.

Fla. Const. art. X, Section 11.

In 1967, Pennekamp Park was expanded to include the submerged land between its 1959 offshore boundary and Key Largo. This expanded territory of Pennekamp Park, like that of the older boundaries of Pennekamp Park, has always been held in title by the state in its sovereignty. This expansion of the state-created park into what is already sovereign submerged land does not change the situation that the submerged land in question has always been held in trust by the Trustees for the people of this state.

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[1] For a historical analysis of the Public Trust Doctrine's common law development in Florida, see State v. Black River Phosphate, Co., 32 Fla. 82, 13 So. 640 (1893); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909); Hayes v. Bowman, 91 So.2d 795 (Fla. 1957).

Marie M. Krieter is a trustee of the Marie M. Krieter Trust, which was created on November 15, 1989. As trustee, Krieter owns property ["Upland Property"] on Key Largo that fronts the Atlantic Ocean. The property contains 100 feet of ocean frontage. Approximately 220 yards from the Atlantic Ocean is an access road to the property. A resident of the upland property, Robert Krieter, submitted an application, on May 19, 1988, to the Florida Department of Environmental Regulation ["D.E.R."] for the construction of a private single family dock on the property. D.E.R. reviewed the application and forwarded it to the Trustees as required by Rule 17-312.060, Florida Administrative Code.

In their letter dated December 18, 1990, the Trustees denied Krieter's request for consent of use. The Trustees stated that they adopted a policy, on April 12, 1990, that no future authorizations would be granted to construct any new private docks in the waters of Pennekamp Park. Marie Krieter brought suit, as trustee of the Marie M. Krieter Trust, against the Trustees and alleged a taking of private property without compensation. The appellant's allegations were brought under the provisions of Section 253.763, Florida Statutes (1989), and the Constitutions of the United States and the State of Florida. The Trustees moved to dismiss the complaint for failure to state a cause of action. In its July 19, 1991, Order of Dismissal, the trial court dismissed the action giving the appellant 20 days to file an amended complaint. The appellant did not file an amended complaint and the trial court entered its Final Order of Dismissal, with prejudice, on August 19, 1991.

The appellant's upland property carries with it certain riparian rights. *Game and Fresh Water Fish Commission v. Lake Islands, Ltd.*, 407 So.2d 189, 191 (Fla. 1981). Although the riparian right of ingress and egress is an

appurtenance to the ownership of private upland property, *Hayes*, 91 So.2d at 799, it is a qualified right which must give way to the rights of the state's people. *Game and Fresh Water Fish Commission*, 407 So.2d at 191 (*quoting Ferry Pass Inspectors; & Shipper's Ass'n v. White's River Inspectors' & Shippers' Ass'n.*, 57 Fla. 399, 48 So. 643 (1909)). As a riparian owner, the appellant argues that the expansion of Pennekamp Park, and the Trustees' subsequent denial of her request for a consent of use to build a dock, denies her the right of ingress and egress, by wharfing out, from her upland property. The appellant argues this a taking by the state for which she is entitled to compensation. We disagree.

Among other principles, the Public Trust Doctrine dictates that there be some impairment of the citizen's right to enjoy absolute freedom before allowing a citizen the use of public submerged land. *Game and Fresh Water Fish Commission*, 407 So.2d 189; *Sarasota County Anglers Club, Inc. v. Burns*, 193 So.2d 691 (Fla. 1st DCA 1967). The appellant made no showing in the record of necessity or that ingress or egress to her property by means of water is the only method thereof. As she alleged in her complaint, her property is bounded on one side by a public road on which she can travel to and from her property. Ingress and egress by water, therefore, is not a necessity for which the appellant may claim a right superior to that of the public.

As a riparian owner, the appellant has no title, of any nature, to the sovereign lands that are held in trust by the Trustees for the people of Florida. *Graham v. Edwards*, 472 So.2d 803, 806 (3d DCA 1985), *rev. denied* 482 So.2d 348 (Fla. 1986). The Trustees have the authority to preclude the construction of private docks when it is in the Public interest to do so. *Graham*, 472 So.2d at 807. This case is not a question of an expanding state marine park that

encroaches upon the rights of a riparian owner. The appellant's riparian rights were subject to the state's ownership of the sovereign submerged lands long before Pennekamp Park was expanded to the shores of Key Largo. The appellant does not have the right to wharf out for purposes of ingress and egress. Ingress and egress is available from the property by land-based routes. Only in the absence of this modern-day alternative could the appellant argue a necessity of ingress and egress. In the absence of such a necessity, the appellant's riparian rights are subject to the public's interests.

Affirmed.

APPENDIX D

Marie M. KRIETER, Trustee,
Plaintiff,

v.

LAWTON CHILES, Governor of the State of Florida; JIM SMITH, Secretary of State; BOB BUTTERWORTH, Attorney General; GERALD LEWIS, Comptroller; TOM GALLAGHER, Treasurer; BOB CRAWFORD, Commissioner of Agriculture; and BETTY CASTOR, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,
Defendant.

No. 91-20065-CA-18.

Circuit Court, Sixteenth
Judicial Circuit, Monroe County.

July 19, 1991.

ORDER OF DISMISSAL

THIS MATTER having come before the Court on May 15, 1991 on the Motion of Defendant to Dismiss or in the alternative to Strike, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Plaintiff does not possess the unqualified right to build a wharf or dock, and Defendants' Motion to Dismiss is granted and the Complaint herein is accordingly dismissed. It is further

ORDERED AND ADJUDGED that Plaintiff shall have twenty (20) days from the date of this Order within which to file amended or further pleadings as Plaintiff deems appropriate.

DONE AND ORDERED in chambers this 19 day of July, 1991.

/s/ J. Jefferson Overby
Circuit Judge

Copies furnished to:

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